

supply of noncommercial educational and informational programming, not at increasing diversity of viewpoints; and (2) in the DBS context Congress has specified the type of programming to be carried and has further provided for access at preferred rates by particular types of programmers. Accordingly, while the Commission's rules for cable leased access are instructive in the DBS set aside context, they cannot be mechanically imported without reevaluation. The explicit statutory scheme created in Section 25 also makes it unlikely that a "leased access"-like approach in the DBS context will be subject to the kind of problems that have plagued cable leased access.

The Commission should not prohibit affiliation between DBS operators and noncommercial programmers using the set aside capacity, since doing so would stifle a natural source of new educational and informational programming. In the cable leased access context, the Commission requires cable operators to make channels available to unaffiliated programmers *except that* an operator may use up to one-third of its reserved capacity for programming from qualified educational programming sources regardless of affiliation.³⁶ Similarly, we believe that allowing a DBS provider to make up to one-third of its reserved capacity available to affiliated educational and informational programming sources would retain sufficient capacity for non-affiliated programmers while also providing an outlet for those operators wishing to create their own public service programming.

In sum, the Commission should permit DBS operators to fulfill the statutory set aside requirement in a variety of ways, whether by identifying qualified programmers and programming to use set aside capacity (including, to a limited extent, existing qualified programming services

³⁶ *Id.* at § 76.977(a).

such as PBS, and *bona fide* political parties and candidates), choosing programming that has been deemed to qualify by a non-profit industry clearinghouse, or using some other means for making capacity available to qualified programmers. This flexible approach -- giving operators a broad range of options for satisfying the statutory mandate -- is the optimal way to ensure DBS subscribers diverse and innovative programming that responds to the set aside requirement yet still allows an integrated programming offering.

5. Pricing

Section 25 requires that DBS providers afford national educational program suppliers access to reserved capacity at no more than 50% of the total direct cost of making such channels available. The statute does not, however, extend this reduced rate to others using the capacity to provide noncommercial educational and informational programming. Thus, the reduced rate does not necessarily apply to all those using the reserved channel capacity.

Clearly, in calculating "total direct costs" for purposes of the statutory limit, such costs must include, at a minimum, a proportionate share of those costs necessary to construct, launch, insure, and operate the satellite -- without which there would be no capacity to reserve. In addition, the proportionate share of any auction payment made to acquire a DBS permit should also be included in the rate base. To the extent that other costs attributable directly and solely to making the capacity available for noncommercial programming, including the cost of backhauling and uplinking the signal, those expenses should be included as well. ASkyB also believes that the Commission should not set rates below 50% of those total direct costs at this time, when most DBS providers are struggling to pay off the costs of satellite construction, launch, insurance, and operation.

6. Schedule for Implementation

The American public has already had to wait several years for the public service programming mandated by Section 25, and the wait should not unnecessarily be prolonged. There is absolutely no evidence that Congress intended to apply the obligations imposed under the statute on a staged basis that would be deferred until the time of license grant or renewal. Such an application of the statute would result in disparate treatment of DBS providers based on nothing but the arbitrary factor of when their license was due to expire. The statute makes compliance with these public service obligations a condition of "provision" of DBS service, clearly indicating that no provider should be exempt from the requirements once they are implemented. Such an approach would serve the public interest both by accelerating the full implementation of congressionally-mandated public service obligations and by placing all DBS providers on an equal footing.

There is also no reason to reduce the capacity set aside by grandfathering existing programming contracts. All DBS providers have been on notice of the set aside requirement since adoption of 1992 Cable Act, notice which was further reinforced by the D.C. Circuit's 1996 ruling upholding the constitutionality of the statute. To the extent any provider chose to ignore the regulatory mandate, it (and not the public) must bear the consequences of its actions. Under similar circumstances, the Commission decided not to grandfather programming contracts for cable channels designated for leased access, since programmers that negotiate to place non-leased access programming on such channels assume the risk that the programming might have to be

bumped for a qualified programmer.³⁷ A different approach in the DBS context would allow existing provider to enjoy an even greater "first mover" advantage over newcomers and the Commission would be placed in the untenable position of effectively penalizing those who are more fully serving the public interest.

The Commission should provide for implementation as soon as orderly transition will allow so that American public gets the benefit of these rules as soon as practicable. We believe that if the rules were to go into effect 180 days after their adoption all DBS providers would have sufficient time to arrange for compliance without undue complications.

7. Application to Foreign-Licensed Satellites

Any public service obligations adopted by the Commission should apply to DBS providers operating from foreign-licensed satellites. The Commission has already laid the groundwork for taking this approach in the one instance where it has authorized such service. The Mexican DBS/DTH Protocol provides that both Mexico and the United States can require DBS systems to reserve a "modicum" of their total channel capacity to provide educational and public interest programming.³⁸ Exempting operators using foreign-licensed satellites from the public service requirements applicable to U.S.-licensed systems would have the perverse effect of giving a competitive advantage to those who are doing the least to serve the American public.

³⁷ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, FCC 97-27 at ¶ 58 (released Feb. 4, 1997)("We do not believe that an operator's contractual obligations with non-leased access programmers excuse it from its statutory obligation to accommodate leased access programmers").

³⁸ *Mexican DBS/DTH Protocol* at Art. VI(1.1).

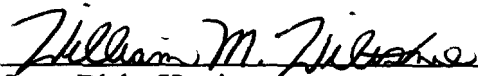
It is true that Section 25(b) does not clearly apply to DBS providers using foreign-licensed satellites, since such satellites are not licensed under Part 100 or Part 25 of the Commission's Rules. However, the earth station facilities necessary for receiving service from such satellites require Commission authorization under Part 25. These receiving dishes are an integral part of any "satellite system for provision of video programming directly to the home" and are licensed under Part 25. Thus, even an operator using a foreign-licensed satellite could reasonably be viewed as falling within the definition of "provider" under Section 25(b)(5)(A)(ii). The public service requirements applicable to U.S.-licensed DBS satellite providers could be incorporated into Part 25 authorizations issued to U.S.-licensed DBS receive antennas. Providers operating from foreign-licensed satellites should be held to the same public interest programming standards applicable to domestic providers, both as a service to American subscribers and in order to avoid creating a competitive disparity in capacity availability.³⁹

³⁹ In a related context, both the Commission and the D.C. Circuit have noted the propriety of applying "the same criteria for meeting the programming standards component of the 'public interest, convenience, and necessity' requirement to both a domestic license proceeding under § 309 and a cross-border broadcast license proceeding under § 325." Fox Television Stations, Inc., 11 FCC Rcd. 14870, 14877 (1996)(quoting Channel 51 of San Diego, Inc. v. FCC, 79 F.3d 1187, 1189 (D.C. Cir. 1996)).

CONCLUSION

ASkyB welcomes the opportunity to provide the American public with quality noncommercial educational, informational, and other public service programming. We believe that the approach outlined above for implementing the statutory mandate would best serve the public interest.

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